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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 RUSSELL R. WILLS and MICHELE  
ERICKSON,

11 Plaintiffs,

12 v.

13 CITY OF DUPONT,

14 Defendant.  
15

CASE NO. 19-5795 RJB

ORDER RE DEFENDANT'S  
MOTION TO DISMISS

16 This matter comes before the Court on Defendant's Motion to Dismiss. Dkt. 38. The  
17 Court has considered the pleadings filed regarding the motion and the remainder of the record  
18 herein.

19 Plaintiffs, proceeding pro se, should be issued a warning regarding Defendant's Motion  
20 to Dismiss (Dkt. 38). In the Motion to Dismiss, Defendant argue that Plaintiffs' Second  
21 Amended Complaint (Dkt. 37) supersedes all prior complaints, provides only vague allegations  
22 and "essentially argues that claims ... asserted in prior, now-superseded and 'non-existent'  
23 complaints should be allowed to proceed," fails to state a claim for which relief can be granted,  
24 and should be dismissed under Fed. R. Civ. P. 12(b)(6). Dkt. 38, at 2 (quoting *Ramirez v. County*

1 of *San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (“It is well-established in our circuit that  
2 an amended complaint supersedes the original, the latter being treated thereafter as non-  
3 existent.”) (internal quotation omitted).

4 **Warning to Pro Se Plaintiffs Regarding Motion to Dismiss.** Plaintiffs are reminded  
5 that “[p]ro se litigants must follow the same rules of procedure that govern other litigants,”  
6 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997), including the Federal  
7 Rules of Civil Procedure and the Local Civil Rules of the Western District of Washington  
8 (“Local Rules”). Plaintiffs are further reminded that although pro se pleadings are held to a “less  
9 stringent standard than formal pleadings drafted by lawyers,” they still must meet the  
10 requirements of the rules. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

11 Pursuant to Fed. R. Civ. P. 12(b), a party may assert the following defenses in a motion to  
12 dismiss: “(1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper  
13 venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim  
14 upon which relief can be granted; and (7) failure to join a party under Rule 19.”

15 Plaintiffs are notified that a complaint must be dismissed under Fed. R. Civ. P. 12 (b)(1)  
16 if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1)  
17 does not arise under the Constitution, laws, or treaties of the United States, or does not fall within  
18 one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a  
19 case or controversy within the meaning of the Constitution; or (3) is not one described by any  
20 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*  
21 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal  
22 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to  
23 dismiss pursuant to Fed. R. Civ. P. 12 (b)(1), the court is not restricted to the face of the  
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1 pleadings but may review any evidence to resolve factual disputes concerning the existence of  
2 jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S.  
3 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal  
4 court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise.  
5 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v.*  
6 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden  
7 of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill*  
8 *Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

9 Plaintiffs are notified that Fed. R. Civ. P. 12 (b)(6) motions to dismiss may be based on  
10 either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
11 cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.  
12 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's  
13 favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule  
14 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to  
15 provide the grounds of his entitlement to relief requires more than labels and conclusions, and a  
16 formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*  
17 *Twombly*, 127 S. Ct. 1955, 1964–65 (2007) (internal citations omitted). "Factual allegations must  
18 be enough to raise a right to relief above the speculative level, on the assumption that all the  
19 allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege  
20 "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

21 Plaintiffs are notified that if the Motion to Dismiss is granted, their claims may be  
22 dismissed and the case closed. Plaintiffs' response to Defendant's Motion to Dismiss, if any, is  
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1 due on **September 14, 2020**, in accord with Local Rule W.D. Wash. 7(d)(3). Replies, if any, are  
2 due in accord with the Local Rules.

3 **IT IS SO ORDERED.**

4 The Clerk is directed to send copies of this Order to all counsel of record and to any party  
5 appearing *pro se* at said party's last known address.

6 Dated this 27<sup>th</sup> day of August, 2020.

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9 ROBERT J. BRYAN  
10 United States District Judge  
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